**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1940

NO. 927

A. Y. OATES and his wife, :
ALMENA OATES, :
Petitioners :

—vs— :

NEW YORK LIFE INSURANCE COMPANY: a corporation, :
Respondent :

# REPLY BRIEF OF PETITIONERS TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES
OF THE SAID COURT:

Petitioners do not wish to be burdensome to the Court but in view of two questions asserted at pages eight to eleven of brief of the respondent, the first question asserted is that the mortgage in question was executed as required by the Constitution of Florida and also as required by the laws of Florida.

By reference to Article X, Section I of the Constitution of Florida, 1885, dealing with homesteads which contains the following provision:

> "And the real estate shall not be alienable without the joint consent of husband and wife when that relation exists."

By reference to Article X, Section IV, the Court will find that the Constitution of Florida contains the following:

> "Nothing in this article shall be construed to prevent the holder of a homestead from alienating his or her homestead so exempted by deed or mortgage duly executed by himself or herself, and by husband and wife, if such relation exists."

We call the Court's attention to the fact that the Constitution uses the language "duly executed." The mortgage in this case was not duly executed.

By reference to Section 5676 of Compiled General laws of Florida relating to married women's acknowledgments, the Court will find the statute provides:

> "to render such sale, conveyance, mortgage or relinquishment, - - - - - effectual to pass a married woman's estate or right, she must acknowledge, before some officer authorized to take acknowledgements of deeds, separately and apart from her husband, that she executed the same freely and voluntarily and without compulsion, constraint, apprehension or fear of or from her said husband, and the officer's certificate shall set forth all the foregoing requirements."

The record before this Court shows conclusively that neither the Constitution nor the statute was complied with in spite of the contention of the respondent.

The most vital objection which we most seriously urge to this Court is that apparently counsel for respondent seeks to say and have this Court understand that the respondent, New York Life Insurance Company, was a bona fide assignee without notice of any latent defect in the mortgage. This is not a fact. If the Court will turn to page thirty-nine of the Petition for Writ of Certiorari the Court will find the opinion written by Mr. Justice Buford of the Supreme Court of Florida.

At page forty-one the Supreme Court of Florida said that:

"if a married woman does not in fact appear before an officer authorized to take acknowledgments, there is no jurisdiction or authority to take such acknowledgment, and a certificate by an officer that an acknowledgment was made before him is a nullity."

At page forty-two the Court will find a concurring opinion of Mr. Justice Davis and in connection with this opinion we wish to call the Court's attention to the fact that the record shows conclusively that it was established by evidence that Mrs. Oates did not at any time appear before the notary or acknowledge her signature.

By reference to Petition for Writ of Certiorari at page 72, the Court will find that the findings of fact made by Judge H. C. Petteway in his final decree dated July 15, 1936 numbered (b) and (c). On page seventy-three the Court did further say:

"However, the Court makes the said findings specifically, because they are undoubtedly established by the evidence in the case, at the request of complainant (petitioners) for whatever they may be worth. In making Findings (b) and (c), however, the Court makes it clear that it does not intend thereby to find that the New York Life Insurance Company is a bona fide purchaser for value without notice from Telfair-Stockton Company."

Again by reference to Petition for Write of Certiorari at page ninety, the Court will find that the Supreme Court of Florida in it's opinion filed in this case on December 22, -1937, said this:

"On the other hand some duty rests upon the other parties to such a transaction, at least prudence requires of them, in the matter of making a loan upon real estate which is held by the entireties by husband and wife, and has the additional peculiarities which the character of a homestead casts upon it, to satisfy themselves that the requirements of the law have been complied with in the formal execution of the mortgage. This the mortgagee

failed to do, but saw fit to rely upon the face of the instrument as to its regularity and the prima facie quality of verity of the notary's certificate notwithstanding the law charges it with a knowledge that it is essential to the validity of such certificate that the wife shall personally appear before the officer and make the acknowledgment which the law requires.

A mortgage does not possess the negotiable character of a promissory note and neither the payee, mortgagee or assignee of such mortgage may accept the same as a courier without luggage.

The knowledge that Mrs. Oates did not in this case appear before a notary public was open to the mortgagee by the slightest effort on its part by having a representative present when the certificate was made, or questioning the husband or wife as to whether the latter appeared before the notary public."

If the Court cares to go into the reason for the findings that the New York Life Insurance Company was not an innocent purchaser in due course for value and without notice, such evidence will be found in the typewritten record on file in the office of the Clerk of this Court and which the Court relieved us of printing at this time. Defendant's Exhibit No. 1 being a legal advertisement inserted in the LAKELAND EVENING LEDGER in the issue of July 13, 1926, where

"Telfair-Stockton Company
Representatives of New York Life Insurance Co.
Loans and Insurance
Jacksonville, Lakeland, Orlando, Miami Beach"

By reference to Petition for Writ of Certiorari at page seven in the summary and statement of the case the Court will find that the mortgage and note involved in this litigation was dated June 1, 1926.

The defendant's Exhibit 2, Defendant's Exhibit 3, Defendant's Exhibit 4, and defendant's Exhibit 5 are all advertisements inserted in the Lakeland news-

papers extending from 1925 to January 13, 1926 and in each of which advertisements Telfair-Stockton Company and New York Life Insurance Company represent that Telfair-Stockton Company are the agents for New York Life Insurance Company.

As a matter of fact, the record shows that Telfair-Stockton Company was only the agent of New York Life Insurance Company and not the lender of the money which they were putting out for New York Life Insurance Company.

In other words, the record conclusively establishes that New York Life Insurance Company was not a bona fide purchaser in due course without knowledge of defects.

As the Supreme Court of Florida so well said in the lengthy opinion by the entire Court filed December 22, 1937:

> "The knowledge that Mrs. Oates did not in this case appear before a notary public was open to the mortgagee by the slightest effort on its part by having a representative present when the certificate was made, or questioning the husband or wife as to whether the latter appeared before the notary public."

Petition for Writ of Certiorari, page 90. The Court then proceeds to discuss the law of the case with the citation of authorities.

We submit to the Court that there is no merit in either contention of the respondent contained in their brief.

Respectfully submitted,

W. B. DICKENSON, SR.

W. B. DICKENSON, JR.